United States Circuit Court, District of Wisconsin.

JAY C. AKERLY *v.* LEVI B. VILAS AND OTHERS.

After a state court has made an order under the Act of Congress for the removal of a cause to a United States court, any further proceedings in the state court or in any other state court by appeal or other process, are void.

A state court making an order for the removal of a cause to a United States court, has no jurisdiction to allow an appeal from such order and to enjoin its clerk from certifying the record pending the appeal.

Where the clerk refuses under such an order to certify the record to the United States court, the latter will, on motion, allow the record and proceedings to be supplied by copies or affidavits, and the cause to proceed as if the record had been duly certified.

Where a state county court has given judgment which has been reversed by the Supreme Court of the state, and judgment entered in effect ordering a *venire de novo*, the cause has not reached final hearing or trial, and a motion to remove to a United States court is in time.

THE plaintiff, a citizen of New York, sued Vilas, a citizen of Wisconsin, and others, in the Circuit Court of Dane county. In October 1868, plaintiff asked the court, under the Act of Congress of March 2d 1867 (Statutes 1867, p. 558), to remove the cause to the Circuit Court of the United States, and on November 8th 1868 the court made an order to that effect, but gave the defendant leave to appeal from this order to the Supreme Court of the state, and enjoined its clerk from certifying the record pending such appeal. The clerk having refused to certify the record, the plaintiff now came into this court with affidavits of the facts and moved for an order allowing him to file in this court copies of the process, pleadings, and other proceedings in the cause, and that the cause might thereupon proceed as if regularly instituted in this court.

Opinion by

MILLER, D. J.—This motion is made under the Act of March 2d 1833, § 4 (4 Stat. 634, Bright. Dig. tit. *Circuit Courts*, pl. 21), which enacts that "In any case in which any party is, or may be by law entitled to copies of the records and proceedings in any suit or prosecution in any state court to be used in any court of the United States, if the clerk of said court shall upon demand, and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceed-

ings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit, that the clerk of such court has refused or neglected to deliver copies thereof on demand as aforesaid, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require or allow, and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such process awarded, as if certified copies of such records and proceedings had been regularly before the said court." The requirements of removal of causes from a court of a state to a court of the United States, according to the Act approved March 2d 1867, 14 Statutes 558, are, that a suit must be pending in the state court at the time of the application for removal, in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, and the matter in dispute exceeds the sum of $500 exclusive of costs, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file in such court an affidavit stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit file a petition in such state court for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings, &c. And it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit.

The Circuit Court of Dane county was satisfied that all the requirements of the act were complied with by plaintiff, and on inspection of the record found that there had not been a final trial or hearing of the suit. The court then accepted the surety offered, and ordered that all proceedings in the suit be stayed. In the 12th section of the Act of 1789, 1 Statutes 73 (Bright. Dig. tit. *Circuit Courts*, pl. 19), is the same provision in respect to the surety upon an application for the removal of causes from state to United States courts, "that it shall be the duty of the state court to accept the surety and proceed no further in the cause." The Supreme Court of the United States in *Gordon* v. *Longest*, 16 Peters 97, decided that when the application for the

removal of a cause is in proper form, and the facts on which the application is founded are made to appear according to the requirement of the act, the party is entitled to a right to have the cause removed under the law of the United States, and the judge of the state court has no discretion to withhold the right. And when on application for the removal, it is shown that the case is one embraced by the act, and that the party has complied with the required conditions, it is the duty of the state court to proceed no further in the cause," and every step further taken in the case, whether in the same court or in an appellate court, is *coram non judice*, and of course nugatory. See also *Kanouse* v. *Martin*, 15 Howard 198. Submitting to the authority of the Act of Congress and of the decisions of the Supreme Court of the United States, I have no other discretion than to decide that the clerk of the Circuit Court of Dane county was not justified in withholding the transcript from the plaintiff, either under the prohibition of the court, or by reason of the appeal after acceptance of the surety, and the order of removal of the cause to this court.

I will dispose of the remaining positions of the defendant's counsel as if upon a motion to remand the cause to the Dane Circuit Court.

It is objected that all the defendants are not citizens of the state of Wisconsin. Levi B. Vilas and Esther G. Vilas, his wife, are the principal party defendants. They are the parties to the mortgage in suit. It is alleged that Martin T. Vilas, one of the defendants, is a citizen of the state of Vermont, and is the owner of the equity of redemption of the mortgaged premises. Thomas Reynolds and Leonard J. Farwell, the remaining defendants, are citizens of this state. It is set out in the petition for removal that the persons named as defendants, except Levi B. Vilas and wife, have been either personally served with process issued in the cause, or have voluntarily entered their appearance, and that all the defendants except Levi B. Vilas have by the rules and practice of the court confessed and admitted the plaintiff's cause of action, by not answering the complaint of plaintiff, as required by law and rules and practice of the court. The state court finds that in this action now pending there is a controversy between Jay Camiah Akerly, plaintiff, and Levi B. Vilas, one of the defendants. From this it would seem that the allegation of the petition that the complaint had been taken as confessed against all the

defendants except Levi B. Vilas is correct. The service and appearance of those defendants may possibly require them to appear and answer a new bill to be brought in this court, or in default of an answer to let the bill be taken as confessed against them. But whether such be the practice or not I need not now determine. At the final hearing a question may be raised whether a decree can be made irrespective of these defendants. At present they do not appear to be necessary parties. See *Wood and Others* v. *Davis*, 18 Howard 457.

Another objection to the removal of the cause to this court is, that the application was not made "before the final hearing or trial in the state court."

It appears from a report of the case in 21 Wisconsin Rep. 88, that the suit is for foreclosure of a mortgage given by Levi B. Vilas and wife to secure the payment of certain bonds. That the cause came on to be heard between the plaintiff and Vilas, the defendant, and a decree was rendered against the plaintiff, the court holding that the bonds and mortgage were invalid, from which decree the plaintiff appealed to the Supreme Court. And the defendant also appealed for alleged error of the court in striking out his counter claims and rejecting evidence in support of them. The Supreme Court decided that the bonds and mortgage were valid, and that one of the counter claims was improperly stricken out, and reversed the judgment of the Circuit Court on both appeals. The cause came on a second time to be tried before the Circuit Court, when a decree was rendered in favor of plaintiff, from which defendant Vilas appealed upon the ground of the rejection by the court of a certain counter claim set up in his answer. The Supreme Court reversed that judgment or decree, and remanded the cause to the Dane Circuit Court for further proceedings according to law. If the cause had been finally determined by either judgment of the Circuit Court, or by order of the Supreme Court, then the application for removal would not have been filed before "the final hearing or trial." But the last order of the Supreme Court reversing the judgment of the Circuit Court and remanding the cause to that court for further proceeding according to law, opened the whole case to litigation, the same as if no judgment had ever been rendered. The Supreme Court in effect ordered a *venire facias de novo*, which required the Circuit Court to hear the cause as if no hearing or trial had taken

place. The whole proceedings were *in fieri* when the petition for removal was presented to the Circuit Court. I am therefore of the opinion that the petition was presented before the final hearing or trial of the cause.

The motion of plaintiff is granted.

Superior Court of Massachusetts. Worcester.

GEORGE W. SAWYER *v.* UNITED STATES CASUALTY COMPANY.

The words "totally disabled from the prosecution of his usual employment," in an accident insurance policy, mean *wholly disabled from doing substantially all kinds of his accustomed labor, to some extent.* A disability that prevents his doing as much in a day's work as before is not total, but one that entirely prevents his doing certain portions of his accustomed work is total, though there are other portions that he is able to do.

THIS was an action upon a policy of insurance against injury by accident, containing the following clause:—"If the said assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment, then, on satisfactory proof of such injury, compensation shall be paid him at the rate of ten dollars per week so long as he shall be totally disabled as aforesaid in consequence of such injury; provided, however, that, for any single accident, such compensation shall not be extended over a period exceeding twenty-six weeks."

The plaintiff claimed compensation for the full period, and the defendants denied his right to recover at all.

The plaintiff, who was a farmer, was in his barn unloading his wagon of corn in the stalk, and hanging the corn upon the beams. He was standing about fourteen feet from the floor upon a plank, which rested on the rounds of two ladders leaning against the hay piled in bays on each side of the barn floor. While reaching up to arrange the corn, one of the ladders slipped on the hay, and the plaintiff fell to the barn floor, striking his back against the corner of the wagon. For some days he suffered great pain, being confined to his bed for three days and to the house for about a week, and was unable to do any work for about a month,